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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 467

ADELE WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 4) is unreported. The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (R. 40) is not as yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1953 (R. 41). The petition for a writ of certiorari was filed on November 13, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Service Life Insurance Act, or the administrative regulations promulgated thereunder, required the use of monies in the National Service Life Insurance Fund to avoid a lapse in policies of level-premium, term National Service Life Insurance where (a) the insured veteran failed to pay premiums on the policies for seventeen months prior to his death in August 1948 and (b) in 1950 the Veterans Administration declared a special dividend, the insured's share of which was larger than the sum of the unpaid premiums required to keep the insurance in force during his lifetime.

STATEMENT

This is the third action brought by petitioner to recover the proceeds of two National Service Life Insurance policies. The courts below were of the view that the decisions of the Court of Appeals on the occasion of the first and second suits, from both of which decisions petitions for a writ of certiorari were denied by this Court, control the disposition of the present litigation. The background and undisputed facts of the controversy are as follows:

Petitioner was named as beneficiary in two certificates of level-premium, term National Service Life Insurance, each for $5,000, taken out by her brother, Eugene Morse, while he was serving in the Armed Forces of the United States (R. 27, 28, 33).

The veteran was honorably discharged on December 7, 1945, and died on August 27, 1948 (R. 27). No premiums were paid on the insurance subsequent to March 31, 1947, a date approximately seventeen months prior to the veteran's death, August 27, 1948 (R. 14).

On March 2, 1949, petitioner filed an action in the United States District Court for the Eastern District of New York. While conceding that there had been a non-payment of premiums after March 31, 1947, petitioner sought to avoid its effect by contending *inter alia* that at the time the veteran made his last premium payment the policies had a reserve, based upon unearned premiums or undeclared dividends, in excess of the amount necessary to cover the unpaid premiums and that, by reason of the Government's failure to declare dividends during his lifetime, the reserve must be treated as having been applicable to keep the policies in force beyond the date of the veteran's death. The United States moved to dismiss the complaint for failure to state a cause of action and the District Court granted the motion. *Weiss* v. *United States,* 92 F. Supp. 322. The Court of Appeals affirmed, 187 F. 2d 610 (C.A. 2), and certiorari was denied, 342 U.S. 820, rehearing denied, 342 U.S. 874, motion for leave to file a second petition for rehearing denied, 342 U.S. 915.

On November 26, 1951, petitioner filed a second complaint in the District Court. Making no reference to the payment or non-payment of premiums

after March 1947, this complaint alleged that the declaration of dividends on policies of National Service Life Insurance by the Veterans' Administrator in January 1950 demonstrated that the veteran had an interest in the National Service Life Insurance Fund sufficient to pay the premiums required to keep the policies in force through the date of his death, and that consequently the policies had not lapsed in the first instance. The United States moved for summary judgment on the ground that the policies had lapsed prior to the veteran's death for non-payment of premiums after March 31, 1947, and that the issues raised by petitioner were *res judicata* by virtue of the former suit. Summary judgment was granted, (*Weiss* v. *United States,* 103 F. Supp. 470) and the Court of Appeals affirmed *per curiam* (199 F. 2d 454) on the District Court opinion and on the authority of its prior decision and similar holdings in other Circuits, *Jones* v. *United States,* 189 F. 2d 601 (C.A. 8); *Parker* v. *Veterans Administration of United States,* 193 F. 2d 149 (C.A. 5). This Court denied certiorari, 344 U.S. 934, rehearing denied, 345 U.S. 914.

On March 19, 1953, petitioner filed a third complaint in the District Court (R. 1, 27-34). Again making no reference to the insured veteran's nonpayment of premiums after March 1947, petitioner renewed, in substance, the earlier allegations that the veteran had an interest in the National Service Life Insurance Fund which was sufficient to pay the premiums required to keep his policies in effect until his death (R. 30-34). The Government moved

for summary judgment on the same grounds as were advanced at the time of the second suit (R. 13-15). On May 25, 1953, the motion was granted and the suit dismissed on the basis of the reasons stated by the Court of Appeals on its consideration of the prior suits (R. 4, 7). The Court of Appeals affirmed *per curiam* on the District Court opinion (R. 40).

ARGUMENT

This action represents petitioner's third attempt to overcome the defense that the veteran failed to make premium payments on his level-premium, term National Service Life Insurance for a period of seventeen months prior to his death. Her present complaint, while stated in somewhat different terms, rests upon the same proposition that was rejected by the courts below on the occasion of the first and second actions—namely, that the policies had a reserve at the time that the veteran made his last payment in March 1947 which could have been applied to keep them in force until the date of the veteran's death. For the reasons set forth in the Government's briefs in opposition filed in connection with the petitions for writs of certiorari from the prior decisions of the Court of Appeals,[1] to which this Court is respectfully referred, the holding of the courts below is plainly correct. Accordingly, no further review is warranted.

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[1] *Weiss* v. *United States*, No. 115, October Term, 1951; *Weiss* v. *United States*, No. 507, October Term, 1952.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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